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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1942

No. 276

JOHN GONZALES and JOHN CHIEROTTI,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of California.

*To the Honorable Harlan Fiske Stone, Chief Justice,
and to the Associate Justices of the Supreme
Court of the United States:*

John Gonzales and John Chierotti hereby petition for a writ of certiorari to the Supreme Court of the State of California on the ground that each of their convictions, in the Superior Court of the State of California, of a felony, to wit: conspiracy to commit

(NOTE): All page references herein are to the certified type-written record on file. The record has not as yet been printed and time will not permit delay until such is done.

grand theft, is void for want of the essential elements of due process in that they were tried and convicted on evidence acquired by officers of the State of California as the result of an unlawful search and seizure of property in the petitioner Chierotti's dwelling.

Petitioner Chierotti seasonably moved the trial court for an order directing the return to him of said property and to suppress and exclude all evidence relating to the unlawful search and seizure. The court denied said motion. Each petitioner, at all stages of the proceeding in the trial court, unsuccessfully objected to the use of such evidence as being violative of the due process clause of the Fourteenth Amendment and challenged such convictions before the Supreme Court of the State of California on like grounds. That court entertained the challenge, considered the Federal question presented, but, by a divided court, refused to enforce petitioners' constitutional rights.

STATEMENT OF THE CASE.

Petitioners were indicted for conspiring together to commit the crime of grand theft (grand larceny) by conspiring to steal money from one Secundo Valenzano by means of a machine which they were charged with representing to Valenzano could duplicate United States currency. (R. 1-6.)

Chronologically stated the pertinent facts are as follows:

On June 6, 1940, Charles L. Iredale, a regular police officer of the City and County of San Francisco, ar-

rested petitioners while they were in an automobile on a street in San Francisco. (R. 190.) The police officer then drove them to a police station where they were searched. (R. 191.)

On the same day, while petitioners were held in custody, Police Officer Iredale and Police Officer Linss, also a member of the San Francisco Police Department, went to the home of petitioner Chierotti, in the Keystone Apartments in San Francisco, Apartment 41, and without any warrant, order or authority of any kind or character and without the permission of Chierotti or any other person, entered Chierotti's apartment and there found a black bag or case in which was an electrical machine (said electrical machine being the one claimed to have been used in conjunction with the representations to Valenzano that it could reproduce U. S. currency.) (R. 102-103, 106-107.)

After the unlawful search of Chierotti's apartment, the police officers took the bag and contents back to where petitioners were in custody and questioned each of them about the black bag. (R. 206-209.)

Thereafter the charge was heard by the Grand Jury of the City and County of San Francisco and at said hearing the bag and its contents were exhibited to the Grand Jury and Police Officer Iredale testified that Valenzano had identified it as the money making machine that had been brought to his place and shown to him by petitioner Gonzales. (R. 19.)

On June 17, 1940, the indictment was returned against petitioners and filed in said Superior Court.

On June 27, 1940, each petitioner entered his plea of not guilty to the charge.

On September 6, 1940, six months before the trial, petitioner Chierotti filed a written motion in the trial court for an order directing the return to him of the case and contents taken by the police officers from his apartment on June 6 as the result of such unlawful search and seizure and for orders suppressing and excluding from evidence, at the trial, said physical property, all testimony of said police officers relative to such search and seizure, anything they saw or did in said apartment and any testimony based on information acquired as the result of such unlawful search and seizure. (R. 11-15.)

Said motion was based upon the ground that to allow said physical property to be admitted in evidence against him at the trial or to allow said police officers to testify as to anything they saw or did during said unlawful search and seizure would be in violation of the rights guaranteed to Chierotti by the due process clause of the Fourteenth Amendment to the Constitution of the United States. (R. 15.)

Said motion was supported by the affidavit of John Chierotti alleging in substance that said apartment was his home and dwelling; that said police officers were peace officers of the State of California; that they entered said apartment without any writ, order, warrant or authority of any kind or character and without the permission of Chierotti or any other person and took said physical property away therefrom without any writ, process or authority so to do and with-

out the permission of Chierotti or any other person. (R. 16-23.) The affidavit prayed for the court to make the same orders specified in the motion and to suppress and exclude such things from evidence at the trial on the ground that their use as evidence against Chierotti would be "in violation of the rights guaranteed to him by the provisions of both the State and Federal Constitutions that he shall not be deprived of his life, liberty and property except by due process of law". (R. 23.)

No counter-showing of any kind was made by the State.

The trial court denied said motion and the whole thereof. (R. 24.)

The trial of petitioners on said indictment commenced on March 24, 1941. (R. 28.) Repeatedly and throughout the trial each petitioner objected to the admission and use in evidence of the bag and contents so taken by the police officers from Chierotti's apartment on June 6, 1940, and to any testimony relating thereto, on the ground that the admission of such evidence against the petitioner Chierotti and also against the petitioner Gonzales was in violation of the Fourteenth Amendment to the Constitution of the United States. The trial court denied each of these objections. Motions were made to strike out such evidence (R. 259-263) and the court denied said motions. (R. 266.)

The portions of the record showing the making of the motions, the grounds therefor and the rulings of the court thereon will be hereafter set forth in full.

Each petitioner was convicted and appealed to the District Court of Appeal of the State of California, First Appellate District, on the grounds that they were convicted without due process of law as guaranteed by the Fourteenth Amendment, based upon the use by the State and admission in evidence of the bag and contents and testimony based on information acquired by the State officers as the result of such unlawful search and seizure.

The Supreme Court of the State of California, prior to the cause being decided by the said District Court of Appeal, ordered the cause transferred to said Supreme Court for hearing and decision (R. 379) pursuant to section 4c of Article VI of the California Constitution.

The Supreme Court entertained the constitutional questions involved and by a divided court decided said constitutional questions against each of said petitioners. The majority opinion was rendered by five of the justices of said court (R. 380-388) while two justices of said court rendered a dissenting opinion. (R. 389-394.)

The result of depriving defendants of their constitutional rights becomes apparent when we consider that they were charged with conspiring with each other to commit the felony. No other person was involved or charged as being involved in the conspiracy. The testimony of the complaining witness Valenzano was to the effect that all of the dealings and negotiations were had solely between him and petitioner Gonzales and that *he never saw the petitioner Chierotti*

until the time of the trial in the Superior Court. (R. 162.) In the absence of the evidence acquired by the state officers, in conducting the unlawful search and seizure, there is no evidence in the record sufficient to connect petitioner Chierotti with the conspiracy charged.

THE CONSTITUTIONAL QUESTIONS INVOLVED.

The constitutional questions involved are as follows:

1. Is not the right to be secure against unreasonable and unlawful searches and seizures by state officers such a fundamental principle of liberty and justice, lying at the base of all our civil and political institutions, as to be embraced within the protection of the due process clause of the Fourteenth Amendment?

2. Does not the use by a state, against a defendant in a criminal trial, of evidence obtained by the state solely as the result of an unlawful search and seizure of said defendant's home, constitute a denial of due process of law as guaranteed in the Fourteenth Amendment?

3. Is not the conviction of a defendant void as lacking the essential elements of due process where such conviction was procured by the state using evidence acquired by its officers as the result of an unlawful and unreasonable search and seizure of the defendant's premises?

4. Where the State Supreme Court admits that an unlawful search of a defendant's home and the un-

lawful seizure therein of personal property constitute a denial of due process of law as guaranteed in the Fourteenth Amendment, does not the decision of said State Supreme Court run counter to the Fourteenth Amendment and deny to the defendant due process of law where it holds that such evidence can be used against the defendant at his trial for a criminal offense, even though he has seasonably objected to the use thereof?

5. Where the decision of the State Supreme Court admits that there is a denial of due process in every instance where state officers acquired evidence by an unlawful search of and seizure in the home of a defendant, does not the decision of such court abrogate and nullify such constitutional right when it unequivocally holds that the state can in every instance use such evidence against the defendant at his trial?

**STATEMENTS REQUIRED BY RULES 12 AND 38
OF THE SUPREME COURT.**

(a) Jurisdiction of the Court.

The jurisdiction of this court is invoked under section 237 of the Judicial Code of the United States.

The basis upon which it is contended that this court has jurisdiction is as follows:

This court has held that certiorari will issue to review a conviction of defendants based upon the use by a state of evidence acquired by the state in a manner prohibited by the Fourteenth Amendment. This court has further held that every principle of

liberty and justice lying at the basis of our civil and political institutions is a principle protected by the due process clause of the Fourteenth Amendment. This court has likewise held that the right to be secure against unreasonable search and seizure by state action is such a fundamental principle of liberty and justice and includes the right of a defendant not to have the state use against him evidence acquired in such unlawful manner. Herein the main evidence used by the state was acquired as the result of an unlawful search and seizure conducted by its officers.

(b) Cases Sustaining Jurisdiction.

Petitioners believe that the following cases sustain the jurisdiction of this court:

Brown v. Mississippi, 297 U. S. 278, 80 L. ed. 682;

Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158;

Chambers v. Florida, 309 U. S. 227, 84 L. ed. 716;

Lisenba v. California, L. ed. Adv. Ops. Vol. 86, p. 179, 62 Supreme Court 280.

(c) The Decision and Judgment of the California Supreme Court.

The majority opinion of the California Supreme Court was rendered on April 2, 1942. (R. 380.)

A petition for rehearing was denied by the California Supreme Court on May 2, 1942. (R. 395.)

The judgment affirming the convictions of petitioners was entered on April 2, 1942, and became final on May 4, 1942, when the remittitur issued out of said Supreme Court to the trial court. (R. 399.)

(d) The Stage in the Proceedings in the Court of First Instance at Which and the Manner in Which the Federal Questions Sought to Be Reviewed Were Raised, Etc.

The manner in which the constitutional question, of whether evidence acquired by a state in an unlawful search and seizure of a defendant's home could be used as evidence against such defendant in the face of special invocation of the due process clause of the Fourteenth Amendment, arose in the trial court and that court's ruling thereon is as follows:

On June 6, 1940, six months before the actual trial of the action, petitioner John Chierotti appeared in the trial court and filed a written motion for an order directing the return to him of the case and contents taken by the police officers from his home and apartment and to suppress and exclude from the evidence at the trial said physical property, all testimony of the officers relative to such search and seizure, anything they saw or did in said apartment or any testimony based on information acquired as the result thereof, etc. The motion was based upon the ground that the use of such evidence against him at the trial would be in violation of the rights guaranteed to him by the due process clause of the Fourteenth Amendment.

Said written motion will be found in the Record from pages 11 to 15 and reads as follows:

“Comes now John Chierotti, one of the defendants above named, and moves the above entitled court for an order directing the Chief of Police of the San Francisco Department and/or the Property Clerk thereof, to return to him all of

that personal property taken on the 6th day of June, 1940, from apartment No. 41 in the Keystone Apartment, located at No. 1369 Hyde Street, in the City and County of San Francisco, State of California, by those certain members and officers of the San Francisco Police Department, to wit: Police Inspector Charles Iredale and Police Inspector Louis H. Linss and which property is now and ever since the date of its taking, as aforesaid, has been in the custody and under the control of said Chief of Police and/or said Property Clerk and/or said San Francisco Police Department. That said personal property is particularly described and set forth in the affidavit of said John Chierotti hereunto attached and special reference is hereby made to said affidavit and the same is included in this motion with like force and effect as if the same were fully set forth herein. Said motion is based upon this notice of motion and the said affidavit of John Chierotti and is based upon the ground that the taking of said property by said police officers at said time and place was and is in violation of section 19 of Article I of the Constitution of the State of California and is violative of the rights guaranteed to defendant herein by said constitutional provision and section, all as is more fully set forth in said affidavit of John Chierotti.

Said defendant further moves the court for each of the following orders, to wit:

1. An order suppressing and excluding from evidence, as evidence against said defendant, in the trial of the above entitled cause, said foregoing described personal property and every part thereof.

2. An order suppressing and excluding from evidence at the trial of the above cause any and all testimony to be given by the said Police Inspector Iredale and/or the Police Inspector Linss relative to anything they or either of them did or saw in said apartment No. 41 of said Keystone Apartments, as aforesaid, upon or following their entry into said apartment on June 6, 1940, as fully appears in the affidavit of John Chierotti attached hereto and filed herewith, special reference to which affidavit is hereby made and by said reference said affidavit is included in this motion with like force and effect as if the same were set forth in full herein.

3. An order suppressing and excluding from evidence at the trial of the above cause, as evidence against said defendant, any and all testimony to be given by the said Inspector Iredale and/or the said Inspector Linss and/or any member of the Police Department of the City and County of San Francisco, relative to said foregoing personal property or any part thereof based upon any knowledge thereof acquired by an exhibition or view of said personal property from and after the entry of said Police Inspectors into said apartment No. 41 of said Keystone Apartments, as aforesaid, on June 6, 1940.

4. An order suppressing and excluding from evidence any testimony to be given by said Inspector Iredale and/or said Inspector Linss and/or any other member of said Police Department as to any conversation had with defendant or any statements made by defendant to either or both of said inspectors or to any other member of the San Francisco Police Department

relative to said personal property, or any part thereof, which said statements were made by defendant or conversations were had with defendant after the taking of said personal property from said apartment No. 41, as aforesaid, and which said statements or conversations were based upon any knowledge acquired by the persons questioning or conversing with defendant from an inspection or view of said personal property from and after the entry of said Police Inspectors into said apartment No. 41 on June 6, 1940, as aforesaid.

5. An order suppressing and excluding from evidence any photographs made of said personal property, or any part thereof, or any description taken thereof or any testimony relating thereto where such photographs were made, descriptions taken, or testimony is based upon a view or inspection of said personal property made when said Police Inspectors entered said apartment on June 6, 1940, as aforesaid, and/or any time thereafter.

The motion for each of the foregoing orders is based on this written motion and on the said affidavit of John Chierotti attached hereto, which affidavit is incorporated in and made a part of this motion and said motion is based upon the ground that said property was unlawfully taken by said Police Inspectors on June 6, 1940, in violation of the provisions of section 19 of Article I of the Constitution of the State of California and that *to allow any of the things to be said or done, for the suppression and exclusion of which this motion is made, would be in violation of the rights guaranteed to said defendant by the said*

provision of the Constitution of the State of California and would deny to said defendant that due process of law as guaranteed to him by both the Constitution of the State of California and the Constitution of the United States of America."

The foregoing motion was supported by the affidavit of John Chierotti (R. 16-23), which alleged in substance that he was one of the defendants named in said cause, that for many months prior to June 6, 1940, his place of abode, residence and habitation was the apartment 41 in the Keystone Apartments, at 1369 Hyde Street, San Francisco; that during said time he was the lessee of said apartment, was paying the rent therefor and had full and exclusive charge and control of said apartment and that the same was his house and dwelling; that on June 6, 1940, he had in said apartment and under his exclusive custody and control the said black bag and its contents the electrical machine (minutely describing the same); that on June 6, 1940, Charles L. Iredale and Louis H. Linss were regular and acting members of San Francisco Police Department and each was a peace officer of the State of California; that on the said last mentioned date the said Iredale and Linss entered his home and apartment in the Keystone Apartments and took therefrom said bag and contents, and when they entered said apartment said police officers did not have any warrant, writ or other process issued by any court, judge or magistrate of the State of California, or otherwise or at all, authorizing them or either of them or any member of the San Francisco Police Department or any other person to enter said

apartment or to take therefrom any personal property and that no such warrant had ever been issued at all; that neither affiant nor any other person having dominion over said apartment had ever given to said police officers Iredale or Linss any permission, right or authority to enter said apartment, as aforesaid or otherwise, and to take therefrom said personal property or any other property; that the entry of said apartment and the taking of said property by said police officers was in violation of affiant's right to be secure in his person, house, papers and effects against unreasonable searches and seizures.

The affidavit contained a prayer for orders directing the return to Chierotti of the property so taken by said police officers and for further orders suppressing and excluding from evidence all of said personal property and any and all evidence and testimony relating to things seen or done by said police officers on the entry into said apartment, and suppressing and excluding from evidence any testimony to be given by either of said police officers relative to any conversation had with Chierotti or any statements made by Chierotti to them relative to said personal property after the taking of the same from said apartment and based on any knowledge acquired by the persons questioning or conversing with affiant from an inspection or view of said personal property when or after it was so taken from said apartment.

The affidavit concluded with the following express invocation of the Fourteenth Amendment (R. 22), to wit:

“That unless the orders herein prayed for be made by this court said personal property will be offered in evidence against affiant at the trial of the above cause and that said members of the San Francisco Police Department will be allowed to testify as to the matters and things hereinabove set forth, all to the great and irreparable damage of affiant and in violation of the rights guaranteed to him by the provisions of both the State and Federal Constitutions that he shall not be deprived of his life, liberty or property except by due process of law and in violation of the foregoing provision of the State Constitution protecting him against unlawful search and seizure.”

No counter showing, by way of affidavit or otherwise, was made by the State to the foregoing motion. The same was argued before the court and continued until September 19, 1940, for decision at which time the trial judge denied the motion. (R. 24.)

At the opening of the trial the first witness called by the People was Secundo Valenzano. During his direct examination the prosecuting attorney ordered the clerk to bring into the courtroom for the first time the black bag and its contents which was done, whereupon the attorney for defendant Chierotti made the following objection:

“Mr. Friedman. Now, if the Court please, at this time on behalf of the defendant Chierotti, I am going to object to there being exhibited to the witness, for the purposes of identification or otherwise, or to the Jury, for consideration in this case, this particular suitcase and its con-

tents, that was just brought into court by the Clerk.

I object to the use of this evidence in any manner in this case, so far as the defendant Chierotti is concerned, on the ground that *the use of this evidence would be a violation of his Constitutional rights as guaranteed by the due process clause and equal protection and immunity clause of the 14th Amendment to the Constitution of the United States*, on the ground that this suitcase was acquired, and its contents were acquired, by the Police Department, members of the Police Department of the City and County of San Francisco, as a result of an unlawful search and seizure, inviolation of Section 9 of Article I of the State Constitution; and *in violation of the due process clause and equal protection and immunity clause of the 14th Amendment to the Federal Constitution of the United States*; and that this suitcase was taken from the premises, the Keystone Apartments, the home, apartment and dwelling of Mr. Chierotti, by Police Officers Iredale and Linss, on June 6th, 1940, when they entered those premises unlawfully and illegally, and without any warrant, or process or authority of any kind or character, and that as a result of these matters and things the acquisition of this suitcase and its contents is in violation of the Constitutions' proscription against the acquisition of evidence in such manner, and the use of the same would be in violation of the defendants' constitutional rights which I have already stated to the Court. * * *

In support of the various matters, and in order that your Honor may pass upon the point, it will

be necessary that I call various witnesses." (R. 123-124.)

A colloquy between court and counsel then ensued whereupon the following proceedings and stipulations were entered into:

"Mr. Garry (the prosecuting attorney). No, I would not stipulate to that. I will stipulate, your Honor, that after the arrest of the defendants Chierotti and Gonzales, and while they were in custody, the officers, Inspectors Iredale and Linss, as a result of information obtained by searching Chierotti, a letter they found in his pocket, went to 1465 Hyde Street, that is the Keystone Apartments, and asked the Clerk if a man by the name of Chierotti lived there, and the Clerk told them that he lived in Apartment 41, and the Clerk then sent the janitor up to the apartment No. 41, who opened the door of Chierotti's apartment in his absence, and the officers obtained this suitcase and contents.

The Court. Is that satisfactory?

Mr. Friedman. You will stipulate that at that time and place which you have just mentioned, also, that no warrant or authority of any kind had been obtained from any court, judge or magistrate of any court authorizing the Police Officers to enter those premises to take that property?

Mr. Garry. I will say the officers took that property without a search warrant.

Mr. Friedman. No warrant or authority.

Mr. Garry. They had no other express right or authority.

Mr. Friedman. No right or authority of any kind or character except they went there and took it.

Mr. Garry. That is right.

Mr. Friedman. Will you further stipulate, so we will have the facts straight,—will you further stipulate that that apartment on that date was occupied by Mr. Chierotti, and that was his home and dwelling, that is where he was living?

Mr. Garry. Yes, sir.

Mr. Friedman. And that he had the exclusive control of that apartment?

Mr. Garry. Yes.

Mr. Friedman. And that he gave no one permission to enter or to take the property?

Mr. Garry. That he didn't give the officers permission to enter the property, and he was not there to give the Clerk or the janitor permission to enter that place.

Mr. Friedman. Yes.

Mr. Garry. Yes, sir.

Mr. Friedman. Since the stipulation, I am satisfied.

Mr. Garry. Yes.

Mr. Friedman. It will be understood that this stipulation consists of our proof in support of our objection to the use of this testimony?

Mr. Garry. Yes.

The Court. Very well.

Mr. Garry. Is your Honor ready to rule?

The Court. Oh, yes." (R. 126-128.)

Following the foregoing the court overruled the objection. (R. 129.)

Valenzano was then shown the suitcase and asked if it looked like the one he saw in the possession of

John Gonzales at which time the following objection was made and the following stipulation entered into:

"Mr. Friedman. Pardon me. If it please the Court, will it be understood that the objection to the use of this suitcase and/or its contents for the purpose of this trial that was made in the absence of the Jury may be considered as having been made at this time in the presence of the Jury?

Mr. Garry. Yes.

Mr. Friedman. And *the objection will go to any use made of it by the prosecution?*

Mr. Garry. Yes, sir.

The Court. *Very well.*" (R. 35.)

One Victor Pelitier, who was the clerk at the Keystone Apartments on June 6, 1940 was next called as a witness by the state. (R. 169.) He testified that he was on duty the day the police officers came and entered Chierotti's apartment and that he saw them come back downstairs. He was then asked if he saw them bringing anything down and he answered, "They brought the black suitcase down." (R. 175.) At this point counsel for petitioners moved that the answer be stricken out and objected to the question on behalf of each of the petitioners "on the ground the question calls for a violation of the constitutional rights of the defendant Chierotti * * * as guaranteed by the Fourteenth Amendment to the Constitution of the United States." (R. 175-176.) The court overruled the objection. (R. 176.)

Police Officer Iredale was then called as a witness by the State (R. 183) and testified in substance as

follows: that on June 6, 1940, about five o'clock in the afternoon he and Police Officer Linss went to the Keystone Apartments in San Francisco and proceeded to apartment 41. (R. 198.) He was then asked if he had ever seen the black bag or case before at which point counsel for petitioners was allowed to cross-examine and the witness Iredale testified as follows: that when he went to the Keystone Apartments neither he nor Mr. Linss had any search warrant to enter the apartment (R. 200), that to his knowledge no search warrant had been issued authorizing the Police Department to enter the apartment. (R. 201.)

Thereupon counsel for petitioners made the following objection and the court made the following ruling:

"Mr. Friedman. In view of that, your Honor, at this time I desire to object to any testimony to be given by this officer, as to anything he saw or did from and after the moment of entering the apartment 41, in the Keystone Apartments, at or about the hour of 5:00 o'clock in the afternoon of June 6, 1940, on the following grounds, to-wit: That the entry of said apartment by said police officers at that time and place, without any legal right or authority, was in violation of the constitutional provisions of the State of California giving unto the defendant Chierotti the right to be immune from unlawful search and seizure of his personal effects, and upon the further ground that *the entry of the police officers into the apartment at that time and place, and anything they said or did there was in violation of the constitutional rights of the defendant Chierotti to be*

immune from unlawful search and seizure, and a violation of the privilege and immunity clause of the Federal Constitution, violative of the due process clause of the Federal Constitution, all of which are included in the 14th Amendment to the Constitution of the United States, and to allow the witness in this case, or the State, to rely upon any evidence that has been procured as a result of an unlawful search and seizure by the officials of the State of California is a denial to the defendant Chierotti, of the rights guaranteed to him by the 14th Amendment to the Constitution of the United States, and by the due process of law clause in the Constitution of the State of California; and in addition to that I make the same objection on behalf of the defendant Gonzales, it being I hope understood that that objection that I have gone through in full is made on behalf of each of the defendants.

Mr. Garry. So stipulated.

The Court. The same ruling as heretofore. The Court has already ruled. I will rule again, of course. The objection is overruled." (R. 201-202.)

The State then offered the bag and its contents in evidence against both of the petitioners. (R. 203.) Whereupon petitioners made the following objection and the court made the following ruling:

"Mr. Friedman. I objection to the introduction of the bag and apparatus, and the bag or the apparatus in evidence, on the ground, first on behalf of the defendant Chierotti that it is a violation of his Constitutional rights as I have heretofore outlined in my objection to any testimony to be given

by this witness, as to the entry of this said apartment; and likewise I object to it on behalf of the defendant Chierotti on the same grounds, and on the additional grounds that anything that this witness found in the apartment of the defendant Chierotti after the arrest of the defendants in this case was and is not binding or evidence against the defendant Gonzales.

The Court. The objection will be overruled." (R. 204.)

The court admitted the bag and its contents in evidence. (R. 204.)

At the conclusion of the People's case each defendant moved the court for an order striking out of the evidence the following things:

(1) The bag and its contents on the ground that it had been acquired by peace officers of the State of California as the result of an unlawful search and seizure and that their use in evidence against the defendant Chierotti constituted a deprivation as to him of due process of law as guaranteed by the Federal Constitution. (R. 260.)

(2) The testimony of Police Officer Iredale relative to his entry into the apartment of John Chierotti in the Keystone Apartments, as to what he saw there, as to his finding the bag and contents and as to his taking it away, and all evidence as to what he saw, did or found upon or following his entry into the apartment of John Chierotti, on the ground that the same were in violation of the Fourteenth Amendment, which included the right of Chierotti to be secure in

his person, houses, papers and effects against unlawful search and seizure. (R. 261.)

The trial court denied the foregoing motions to strike. (R. 266.)

(e) The Time and Manner in Which the Federal Questions Sought to Be Reviewed Were Raised in the Supreme Court of California and That Court's Action Thereon.

On conviction of petitioners they each promptly appealed from the judgments pronounced upon them and from the court's order denying their motion for a new trial. (R. 67.)

In support of their appeal and pursuant to the law governing the taking of such appeals, petitioners filed their designation of the points to be relied on by them on said appeals and in said designation specified, among other things, the following:

"8. That the court erred in not upholding the constitutional rights of the defendant Chierotti by excluding from evidence and refusing to strike out therefrom all testimony relating to the unlawful entry without a search warrant into the home of the said John Chierotti on June 6, 1940, by members of the San Francisco Police Department, together with all testimony relative to said entry, what was seen or done there and all testimony based upon information acquired by said police officers as the result of such unlawful entry.

9. That the court erred in not excluding and refusing to strike out People's Exhibits Nos. 3, 4, and 6, the same having been unlawfully seized by members of the San Francisco Police Department on their entry into the home of John

Chierotti on June 6, 1940, without any search warrant having been issued and without permission having been given by the said John Chierotti, or anyone else having charge or control of said home or apartment so to do.

10. That the court erred in admitting in evidence any and all evidence and testimony relating to or acquired as the result of the entry into the home of John Chierotti on June 6, 1940, by members of the San Francisco Police Department, said entry being unlawful and in violation of section 19 of Article I of the Constitution of the State of California and in violation of the Fourteenth Amendment to the Constitution of the United States and the due process of law clause therein contained; that the admission of such testimony and of the physical articles acquired as the result of such unlawful search and seizure was and is in violation of the constitutional rights of John Chierotti as guaranteed to him by the Constitution of the United States and the due process of law clause thereof." (R. 70-71.)

The Supreme Court entertained and passed upon the constitutional questions raised by said appeal as is apparent from both the majority opinion (R. 380) and the minority opinion (R. 389) of said court.

The majority opinion of the California Supreme Court denied to petitioners the constitutional rights specially set up and claimed.

The portion of the majority opinion showing that the constitutional questions were properly raised by petitioners and the court's action thereon is as follows:

“Chierotti and Gonzales objected to any testimony by Officer Iredale regarding the entry and search of Chierotti’s apartment and the seizure of the case and contents, as well as to the introduction and use of the latter as evidence, on the ground that the entry, search, seizure, and use of the property violated the rights guaranteed to Chierotti by the Fourteenth Amendment to the Constitution of the United States, * * *” (R. 381.)

“Defendants contend, however, that the prohibition in the Fourth Amendment of unreasonable searches and seizures is included in the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law, and therefore that under the interpretation given to the Fourth Amendment by the federal courts the introduction of evidence obtained by an illegal search and seizure constitutes a denial of due process of law. Not all of the first ten amendments to the federal constitution, however, fall within the concept of due process of law. (Citing cases.) In the determination of whether the prohibition against unreasonable searches and seizures is included within this concept, the unlawful search and seizure must be distinguished from the introduction in court of the evidence obtained as a result thereof. ‘The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures’ may be so fundamental as to make any unreasonable search and seizure by a public officer a violation of due process of law. It does not necessarily follow, however, that the use in a court of law of evidence thus obtained is so contrary to funda-

mental principles of liberty and justice as to constitute a denial of due process of law. A criminal trial does not constitute a denial of due process of law so long as it is fair and impartial. (See cases cited in 16 C. J. S. 1185 et seq.) There is a failure to observe that 'fundamental fairness essential to the very concept of justice' when a trial is but a pretense (*Lisenba v. California*, 62 Sup. Ct. 280, 290), as a trial dominated by a mob (*Moore v. Dempsey*, 261 U. S. 86), or when the defendant is denied the right to counsel (*Johnson v. Zerbst*, 304 U. S. 458), or when his conviction results from testimony known by the prosecution to be perjured (*Mooney v. Holohan*, 294 U. S. 103), or from an involuntary confession obtained through coercion or torture. (*Chambers v. Florida*, 309 U. S. 227; *Brown v. Mississippi*, 297 U. S. 278.)

While the United States Supreme Court has held that the due process clause includes the guarantee of the Fifth Amendment against compulsory self-incrimination to the extent that the Amendment forbids the use of a confession obtained by coercion or torture (*Chambers v. Florida*, *supra*; *Brown v. Mississippi*, *supra*; *Lisenba v. California*, *supra*. See *Bram v. U. S.*, 168 U. S. 532), it has done so because a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice. (*Chambers v. Florida*, *supra*; *Brown v. Mississippi*, *supra*; *Lisenba v. California*, *supra*; cf. *Twining v. New Jersey*, *supra*.) The use of evidence obtained through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial." (R. 383-4.)

(f) The Grounds Upon Which It Is Contended That the Questions Involved Are Substantial.

No higher duty devolves upon any court than the enforcement and protection of a right guaranteed by the Constitution. In the present case the violation of the constitutional right of John Chierotti to be protected from unlawful and unreasonable search of and seizure upon his premises by state officers was a right of the highest character and one that should have been protected, from the inception of the proceedings, by the courts of California.

The right to be immune from unlawful search and seizure means more than that the person whose right is violated can resort to a civil action for the recovery of any property so illegally taken by state officers. This court, as pointed out in the brief filed in support of this petition, has invariably and unequivocally held that the right to be protected against unlawful search and seizure includes the right not to have used as evidence against the person whose right has been violated, any property, documents or information acquired by public officers as the result of such unlawful act.

This court has repeatedly held that any fundamental principle of liberty and justice is protected from infringement by the State under the due process clause of the Fourteenth Amendment. This court has also repeatedly held that the right to be secure against unlawful search and seizure is such a fundamental principle of liberty and justice.

The majority opinion of the Supreme Court of California has denied these great constitutional rights by holding that, although the right to be immune from unlawful search and seizure may fall within the protection of the due process clause, the use of evidence so acquired by a state does not fall within the protection of the Amendment.

We cannot use more apt words to demonstrate that the questions involved are substantial than those used by Mr. Justice Carter in the dissenting opinion concurred in by Mr. Justice Hauser:

“It cannot be seriously questioned that to permit the use of evidence obtained in violation of the constitutional provision at least to some extent infringes upon the field of liberty secured by the inhibition against unlawful searches and seizures. But it goes beyond a mere partial invasion. It in effect practically destroys the right. That is true for the reason that the value of any right varies in direct proportion to the means afforded for the protection of the right; the realization of any benefit from the right is wholly dependent upon the existence of instruments for that purpose. If it may be violated and the fruits of the violation directed against the possessor of it, the fruits of it are lost, and it is no more than a bare abstraction.” (R. 389.)

“Permitting such evidence to be used is an invitation and encouragement to law enforcing officials to violate the Constitution. It gives them free reign to act upon mere suspicion and conjecture, to the harassment of the persons offended and to the end that the sanctity of his home or

depository of his papers and effects is destroyed. It is of small comfort to say that he has an action against the officers. In most instances the amount of recovery would be negligible and the process costly." (R. 390.)

"The more I read and hear about the tyranny of totalitarianism as it pervades a large part of the world today, the more appreciative I am of the constitutional form of government and the constitutional guarantees which we have in this country and in this state. And every time I see an effort being made to abrogate or nullify by interpretation any of the constitutional provisions designed to protect the life, liberty and property of the people, I shudder to contemplate what will happen if this disposition to abrogate and nullify these constitutional provisions continues. I, for one, shall never yield to the doctrine that a constitutional provision designed to protect the life, liberty and property of the people of this country should be abrogated or nullified by interpretation. If political, social or economic conditions require changes in our Constitution, such changes should be made by amending the Constitution in the manner prescribed by it, but it is not for the courts by their decisions to abrogate or nullify constitutional provisions by interpretation or read into those provisions that which was never intended to be included therein." (R. 393.)

**REASONS RELIED ON FOR ALLOWANCE OF THE
WRIT OF CERTIORARI.**

Each petitioner advances the following reasons as the grounds relied on for the issuance of the writ prayed for herein.

First: That the California Supreme Court has decided a federal question of substance not heretofore determined by this court, to wit: whether the use by a state, in a criminal trial, over seasonable objection, of evidence acquired by the state conducting an unlawful search of and seizure upon defendant's premises, constitutes a denial of due process of law as guaranteed by the Fourteenth Amendment.

Second: That each petitioner was denied the benefits and convicted in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States by the lower court permitting the guilt or innocence of petitioners to be determined upon evidence acquired by the State as the result of an unlawful search and seizure; that the majority opinion of the California Supreme Court upholding such action is contrary to the prior decisions of the Supreme Court of the United States holding that the right to be secure from such unlawful search and seizure by state action is one of the fundamental principles of liberty and justice and that any such fundamental principle is protected from state action by the Fourteenth Amendment.

Third: That the majority opinion of the California Supreme Court, holding that where the State has

acquired property and evidence as the result of an unlawful search and seizure of a defendant's home, such defendant cannot have the property so unlawfully acquired returned to him or excluded from the evidence at his trial, although he had made seasonable application to the trial court for its return and exclusion, is contrary to applicable decisions of the Supreme Court of the United States.

Fourth: That the matters passed upon in the majority opinion of the California Supreme Court relative to the right of a person to be secure against unlawful search and seizure by state action is an important question of constitutional law decided in a way untenable and in conflict with the weight of authority and applicable decisions of this court.

Fifth: That the majority opinion of the California Supreme Court denying to each petitioner the right to have his guilt or innocence established without resort by the State to evidence acquired by it as the result of an unlawful search and seizure of the home of one of the petitioners renders the conviction of petitioners void as lacking the essential elements of due process of law and is directly contrary to applicable decisions of this court.

CONCLUSION.

For the reasons herein stated each petitioner respectfully prays that this Honorable Court issue a writ of certiorari to the Supreme Court of the State

of California to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, San Francisco, California,

July 27, 1942.

Respectfully submitted,

LEO R. FRIEDMAN,

Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am attorney for petitioners in the above entitled cause and proceeding and that, in my judgment, the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,

July 27, 1942.

LEO R. FRIEDMAN,

Attorney for Petitioners.